STATE OF MICHIGAN

COURT OF APPEALS

RICHARD D. POTTER,

Plaintiff-Appellant,

v

SECREST, WARDLE, LYNCH, HAMPTON, TRUEX & MORLEY, P.C., BROOKOVER, FLEISCHMANN & CARR, P.C., and FRANK A. FLEISCHMANN,

Defendants-Appellees.

UNPUBLISHED
May 8, 2007

No. 265002
Eaton Circuit Court
LC No. 04-000239-NM

Before: Markey, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals by right various orders effectively dismissing his lawsuit. We affirm.

This Court has granted defendant Frank Fleischmann's motion to dismiss the appeal against him on the ground that it is moot because any debt that he may potentially owe plaintiff has been discharged in bankruptcy. Thus, we consider the merits of this appeal only with regard to the remaining defendants, Secrest, Wardle, Lynch, Hampton, Truex & Morley, P.C. (Secrest Wardle) and Brookover, Fleischmann & Carr, P.C. (Brookover).

On January 11, 2000, Fleischmann, an attorney employed by Brookover, agreed to represent plaintiff in a medical malpractice lawsuit against Dr. R. S. Nair. Plaintiff alleged that he suffered continuing nerve damage as a result of Dr. Nair's malpractice. Although Fleischmann sent Dr. Nair a notice of a claim pursuant to MCL 600.2912b, it is undisputed that Fleischmann never filed a malpractice complaint in court.

From January 2000 to the end of September 2003, Fleischmann led plaintiff to believe that a lawsuit was pending in circuit court. In March 2002, Fleischmann joined defendant law firm Secrest Wardle. While employed by Secrest Wardle, Fleischmann continued to mislead plaintiff. In October 2003, plaintiff discovered that no malpractice suit had ever been filed on his behalf. Plaintiff subsequently filed this suit against Fleischmann and defendant law firms alleging counts of malpractice, breach of fiduciary duty, intentional fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress.

Plaintiff first argues that the trial court erred in granting defendant Secrest Wardle's motion for summary disposition and dismissing all claims against it. We disagree.

We review de novo a trial court's grant or denial of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the trial court did not indicate whether it granted the motion for summary disposition pursuant to MCR 2.116(C)(8) or (C)(10), because the court considered evidence outside of the pleadings, we will review the lower court's decision under the standard for MCR 2.116(C)(10). *Spiek*, *supra* at 338. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 337. When reviewing a trial court's decision to grant a motion for summary disposition, we consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Id*.

Generally, "[u]nder the doctrine of respondeat superior, an employer may be vicariously liable for the acts of an employee committed within the scope of his employment." *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). Conversely, an employer cannot be held liable for an act committed by the employee that is beyond the scope of his or her employment. *Borsuk v Wheeler*, 133 Mich App 403, 410; 349 NW2d 522 (1984). "Intentional and reckless torts are generally held to be beyond the scope of employment." *Id.* An employer may be held liable under the doctrine of respondeat superior where the employee was promoting or furthering the employer's business in some way, or if the employee committed a tort while involved in a service of benefit to the employer. *Kester v Mattis, Inc*, 44 Mich App 22, 24; 204 NW2d 741 (1972). But no vicarious liability exists if the employee steps aside from his employment in order to accomplish some purpose of his own or acts outside of the scope of the employee's authority. *Bryant v Brannen*, 180 Mich App 87, 98-99; 446 NW2d 847 (1989).

In the instant case, the record reveals that Fleischmann entered into the attorney-client relationship with plaintiff while he was employed at defendant Brookover. There is no evidence that Secrest Wardle obligated itself on the contingency fee agreement between plaintiff and Fleischmann. Moreover, at no time did Fleischmann notify anyone at Secrest Wardle that he was purportedly representing plaintiff in connection with a lawsuit. In addition, the evidence supports a finding that Fleischmann had no authority from Secrest Wardle to represent plaintiff on any matter during the period of his employment with the firm. There can be no vicarious liability for the actions of a defendant-employee whose sole purpose is his own. *Bryant*, *supra* at 98-99.

Plaintiff next argues that the trial court erred in holding that his causes of action for intentional torts in this case were merely duplicative of his legal malpractice claims. We agree in part, but conclude that the error is harmless.

The trial court did not indicate whether it granted the motion for summary disposition pursuant to MCR 2.116(C)(8) or (C)(10). It does not, however, appear that the court considered evidence outside of the pleadings as to this issue, so we will review the lower court's decision under the standard for MCR 2.116(C)(8). *Spiek*, *supra* at 338. "MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. The motion must be granted if no factual development could justify the plaintiffs' claim for relief." *Id*. at 337.

Plaintiff contends that his claims of breach of fiduciary duty, fraud, and intentional infliction of emotional distress should not fail because they merely reiterate his legal malpractice claim. Defendants argue otherwise, citing *Aldred v O'Hara-Bruce*, 184 Mich App 488; 458 NW2d 671 (1990), and *Barnard v Dilly*, 134 Mich App 375; 350 NW2d 887 (1984). These cases, however, do not stand for the proposition that claims arising out of an attorney-client relationship can only sound in negligence. Rather, they merely provide that the applicable period of limitations depends on the theory actually pleaded where the same set of facts support either of two different causes of action. See *Aldred, supra* at 490; *Barnard, supra* at 378.

Generally, when characterizing potentially duplicative claims in a legal malpractice context, this Court must read a plaintiff's complaint as a whole and determine the type of interest allegedly harmed and how this is claimed to have occurred. *Aldred, supra* at 490. When a plaintiff alleges negligent legal representation, the claim is one of legal malpractice. *Id.* But, when the interest involved in a claim for damages differs from the interest involved in a legal malpractice case, they may stand as separate claims. See, e.g., *Brownell v Garber*, 199 Mich App 519, 532; 503 NW2d 81 (1993).

The elements of a claim of legal malpractice are: (1) the existence of an attorney-client relationship; (2) negligent legal representation of the plaintiff; (3) that the negligence proximately caused an injury; and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

Plaintiff's complaint also alleges that Fleischmann breached his fiduciary duty to plaintiff. Generally, relief for a breach of a fiduciary duty may be sought when a "position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vincencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). This Court previously has held that a breach of fiduciary duty claim differs from a legal malpractice claim because "[t]he conduct required to constitute a breach of fiduciary duty requires a more culpable state of mind than the negligence required for malpractice." *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005).

We find that the gravamen of plaintiff's count of breach of any fiduciary duty imputed to Fleischmann does not sound in legal malpractice, and is therefore a cause of action distinct from plaintiff's malpractice claim. Thus, the trial court erred in its rationale for granting defendants' motion for summary disposition as to that count. Although plaintiff asserts that Fleischmann's legal representation of plaintiff was inadequate because he failed to file plaintiff's medical malpractice case against Dr. Nair, he also argues that Fleischmann "intentionally misled . . . [plaintiff] into believing that he had a case pending against Dr. Nair." Plaintiff's allegation that Fleischmann misled him into believing he had a pending case appears to satisfy the requirement of a culpable state of mind that is sufficient to support a cause of action for breach of fiduciary duty. *Id.*

Plaintiff's complaint next asserts a count of intentional fraud. This Court previously has held that "the interest involved in a claim for damages arising out of a fraudulent misrepresentation differs from the interest involved in a case alleging that a professional breached the applicable standard of care. Simply put, fraud is distinct from malpractice." *Brownell, supra* at 532. Specifically, plaintiff alleges that Fleischmann "made material misrepresentations to the plaintiff and continued those material representations to plaintiff."

Further, plaintiff asserts that "[s]aid representations were false . . . . When . . . [Fleischmann] made the representations, he knew that they were false and made the representations as positive assertions . . . . [Fleischmann] made the representations with the intention that the plaintiff would act upon them . . . . The plaintiff acted in reliance upon the representations . . . . The plaintiff suffered damage."

The elements of fraud are as follows:

> "(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." [*Id*. at 533, quoting *Scott v Harper Recreation, Inc*, 192 Mich App 137, 144; 480 NW2d 270 (1991), rev'd on other grounds 444 Mich 441 (1993).]

In this case, plaintiff's complaint states a cause of action based upon Fleischmann's alleged misrepresentations that is distinct from legal malpractice. Therefore, the trial court erred in its rationale for granting defendants' motion for summary disposition as to this count.

Next, plaintiff alleges a count of intentional infliction of emotional distress. Specifically, plaintiff asserts that Fleischmann's "conduct . . . was extreme, outrageous, and of such character as not to be tolerated by a client . . . . was for an ulterior motive or purpose . . . [and] has resulted in and continues to result in emotional distress as well as damage to the plaintiff."

The elements of the tort of intentional infliction of emotional distress are as follows: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). Liability attaches only when a plaintiff can demonstrate that the defendant's conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id*. Further, "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficient to impose liability. *Id*. Rather, a defendant can be determined to be liable only when his conduct is so extreme that "'the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Id*. at 675, quoting *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985).

The interest involved in a claim for damages for intentional infliction of emotional distress—relief from a defendant's outrageous conduct—appears to differ from the interest involved in a legal malpractice case. Therefore, they may stand as separate claims. In this case, it appears that plaintiff has stated a cause of action for intentional infliction of emotional distress based on Fleischmann's alleged repeated misrepresentations that are separate from his claim of legal malpractice for inadequate representation. Therefore, the trial court erred in granting defendant's motion for summary disposition based on this ground.

Nevertheless, although the trial court wrongly concluded that plaintiff's causes of action for breach of fiduciary duty, intentional fraud, and intentional infliction of emotional distress were merely duplicative of plaintiff's legal malpractice claim, we find that its grant of summary disposition on these counts as to Brookover remains proper.[1] As a matter of law, Brookover is not vicariously liable for Fleischmann's alleged intentional torts.

As discussed above, an employer is generally not vicariously liable for an employee's intentional torts. *Borsuk*, *supra* at 410. Moreover, although an employer may be held liable under a theory of respondeat superior for torts committed by an employee where an employee could have been promoting or furthering the employer's business in some way, an employer may not be held liable for torts committed by an employee who steps aside from his employment in order to accomplish some purpose of his own. *Bryant*, *supra* at 98-99; *Kester*, *supra* at 24.

In this case, plaintiff alleged intentional torts for which an employer is generally not liable. Additionally, the record is void of evidence that Brookover benefited from Fleischmann's actions. Although Fleischmann entered into an attorney-client relationship with plaintiff while he was employed at defendant law firm, there is no evidence that Brookover benefited in any way from that relationship. The evidence before the trial court indicates that plaintiff executed a contingency fee agreement with Fleischmann on behalf of Brookover. But, there is no evidence that anyone at Brookover, with the exception of Fleischmann, was aware of the agreement or benefited financially from it. In contrast, the record contains evidence that after plaintiff called Brookover requesting to speak with Fleischmann, defendant "determined that . . . [plaintiff] was never a client of the firm through an utter absence of records, such as a fee agreement, case file, billing records, etc," and referred plaintiff to Secrest Wardle, Fleischmann's employer at the time of the call. Moreover, as discussed above, the record supports a finding that Fleischmann's actions were designed for his own benefit—to avoid a legal malpractice suit against him. Fleischmann only benefited from these actions and Brookover cannot be held vicariously liable for them.

In summary, we find that the trial court erred in concluding that plaintiff's causes of action for breach of fiduciary duty, intentional fraud, and intentional infliction of emotional distress were merely duplicative of his legal malpractice claim. Nevertheless, summary disposition remains appropriate as to these claims because Brookover is not vicariously liable for any intentional torts Fleischmann allegedly committed. "A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

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[1] Brookover raised this argument before the trial court during its motion for summary disposition, but the court does not appear to have considered it in making its decision. Regardless, we may consider this argument. Generally, it is not necessary to file a cross-appeal in order to urge an alternative ground for affirmance, whether or not the trial court considered the argument below. *Vandenberg v Vandenberg*, 253 Mich App 658, 663; 660 NW2d 341 (2002).

Plaintiff next asserts that the trial court erred in dismissing his cause of action for legal malpractice insofar as it related to Fleischmann's failure to competently pursue his medical malpractice claim. We disagree.

Again, although the trial court did not indicate whether it granted the motion for summary disposition pursuant to MCR 2.116(C)(8) or (C)(10), it appears to have relied only on the pleadings. Consequently, we will review the lower court's decision under the standard for MCR 2.116(C)(8). *Spiek*, *supra* at 338. "The motion must be granted if no factual development could justify the plaintiffs' claim for relief." *Id*. at 337.

The trial court reasoned as follows:

> The defendants first argue that plaintiff's legal malpractice case is defective and must be dismissed because it fails to allege that plaintiff had a valid underlying medical malpractice case against Dr. Nair. This does not appear to be in dispute. The plaintiff's malpractice claim does not lie in the failure to properly perfect the complaint against Dr. Nair, but in the lying, dissembling and distortion of the legal work by . . . Fleischmann. While the plaintiff cannot maintain an action for damages as a result of Fleischmann not pursuing the medical malpractice case, he may maintain a suit for the legal malpractice of lying and dissembling regarding the status of the case.

As discussed above, to establish a legal malpractice claim, a plaintiff must prove (1) the existence of an attorney-client relationship, (2) negligence, (3) proximate causation, and (4) an injury in fact. *Simko*, *supra* at 655. "Further, where the alleged malpractice results from the failure to diligently pursue or timely file a client's claim, a plaintiff seeking to establish the third and fourth elements of the claim, i.e., proximate cause and damages, must show that but for the attorney's alleged malpractice she would have been successful in the underlying suit." *Estate of Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002).

In this case, plaintiff does not dispute that he cannot prove a medical malpractice claim against Dr. Nair. Rather, the essence of plaintiff's argument is that either the "suit within a suit" requirement should not apply to him or that there should be a change in the law because it is unfair to potential litigants. Plaintiff, however, makes only cursory arguments and cites no authority. Generally, this Court is not required to search for authority to sustain or reject a position raised by a party without citation to authority. *In re Reisman Estate*, 266 Mich App 522, 533; 702 NW2d 658 (2005). Our Supreme Court has noted that:

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

In any event, the trial court did not err in dismissing plaintiff's legal malpractice claim based on Fleischmann's alleged failure to competently pursue his medical malpractice cause of action. Because plaintiff's complaint did not allege a valid underlying medical malpractice case

against Dr. Nair, and he does not dispute that he cannot prove the underlying cause of action, he cannot prove the requisite proximate cause and damages for his legal malpractice claim based on Fleischmann's failure to competently pursue his medical malpractice claim.

Still, we find that the trial court erred in denying defendant's motion for summary disposition as to plaintiff's claim of legal malpractice as it relates to the "lying and dissembling" regarding the status of plaintiff's case because Brookover is not vicariously liable for Fleischmann's alleged actions.

As discussed above, the record does not support a finding that Brookover benefited from Fleischmann's misrepresentations, which the trial court properly characterized as designed to cover up a potential legal malpractice claim against him. Although Fleischmann entered into an attorney-client relationship with plaintiff while defendant law firm employed him, the evidence supports a finding that no one at Brookover was aware of the agreement or benefited financially from it. Fleischmann's actions of "lying and dissembling" appear to have been solely for the purpose of covering up his potential liability to plaintiff. Therefore, Brookover cannot be vicariously liable for them. *Bryant*, *supra* at 98-99.

In summary, the trial court did not err in dismissing plaintiff's legal malpractice cause of action insofar as it related to Fleischmann's failure to competently represent plaintiff in his medical malpractice suit. But, the trial court did err in denying Brookover's motion for summary disposition in its totality because Brookover is not vicariously liable for plaintiff's "lying and dissembling" about the status of plaintiff's medical malpractice case. Under the circumstances, however, we find that the error is harmless given the trial court's ultimate dismissal of this case in its entirety.

Plaintiff's final argument on appeal is that the trial court erred in dismissing plaintiff's cause of action for legal malpractice because plaintiff cannot show objective evidence of damage as a result of Fleischmann's actions. We find that because Brookover is not liable under a theory of repondeat superior for Fleischmann's alleged legal malpractice, it is not liable to plaintiff for damages in any form and this issue is moot. Therefore, we need not consider it. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Richard A. Bandstra